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In the Supreme Court of the United States

APRIL DEBOER, *et al.*,
Petitioners,

v.

RICK SNYDER, GOVERNOR OF MICHIGAN, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF OF LISA BROWN, CLERK/REGISTER OF DEEDS FOR OAKLAND COUNTY, MICHIGAN, AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF AMICUS CURIAE[1]

Amicus, Lisa Brown, is currently the Clerk/Register of Deeds for Oakland County, Michigan. She has held this position since January 1, 2013. Due to her position, she was a named Defendant in the District Court proceedings in this matter. Throughout the litigation, Ms. Brown took a legal position inconsistent with other Defendants. Ms. Brown believes that the Michigan Marriage Amendment (hereinafter "MMA") is unconstitutional. In fact, she supported Plaintiffs-Petitioners' legal position in briefs filed and testimony given during the trial.

In addition, Brown was one of four Michigan county clerks who opened her office on a Saturday following Judge Friedman's ruling that the MMA was unconstitutional so that marriage licenses could be issued to same-sex couples immediately. As a result of the actions of these clerks, approximately 300 couples were married in a few hours before a stay was issued. Although Michigan had initially refused to recognize these marriages, the state has recently decided not to appeal a decision granting an injunction requiring the state to recognize the marital status of these couples and providing all benefits authorized by Michigan law.

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[1] No party counsel authored any of this brief, and no party, party counsel, or person other than the amicus or her counsel paid for brief preparation and submission. All parties consented to the filing of this brief. Respondents provided blanket consent. Petitioners provided a letter of consent, which is filed with this brief.

In her role, Ms. Brown has already experienced the deleterious effects of a "wait and see" approach as the State of Michigan refused to acknowledge and provide marital benefits to same-sex couples to whom she issued valid marriage licenses. Given her role in this case as a Defendant as well as her personal experience as County Clerk, Ms. Brown brings a unique perspective to the issues before this Court.

SUMMARY OF ARGUMENT

In order to eliminate the second class status of gay men and lesbians wishing to marry, the Supreme Court must recognize on a nationwide basis that same-sex marriages are without exception protected by the Equal Protection Clause of the U.S. Constitution. Anything short of this blanket protection will permit on-going discrimination against this subset of individuals who are involved in intimate relationships and seek marital status. State and local officials who are responsible for administrating and enforcing state marriage laws should not be permitted to arbitrarily pick and choose those relationships eligible for marriage recognition and those relationships that will not be so recognized. Our experience establishes that if permitted to so, state and local legislative bodies will allow and encourage officials to perpetuate the pre-existing discrimination against intimate same-sex relationships which led to very liberty and equal protection violations which are now under scrutiny.

ARGUMENT

I. Introduction

On January 23, 2012, Plaintiffs April DeBoer and Jayne Rowse, an unmarried same-sex couple, filed suit against Governor Snyder and Attorney General Schuette in their official capacities. Plaintiffs challenged Michigan's adoption laws, which prevented the couple from adopting children together, as a violation of equal protection. On October 3, 2012, the Plaintiffs amended their complaint to add a challenge to the Michigan Marriage Act (hereinafter "MMA" or "amendment") on due process and equal protection grounds. Plaintiffs added Bill Bullard, Jr., Oakland County Clerk, as a Defendant in the case due to his role issuing marriage licenses.

In November 2012, after the filing of Plaintiffs' lawsuit challenging the MMA, Lisa Brown was elected to the position of Oakland County Clerk. As Oakland County Clerk, Brown is charged with issuing marriage licenses, recording death certificates, and recording deeds, among other duties. She took office on January 1, 2013, swearing to "support the Constitution of the United States and the constitution of this state."

Brown's understanding of the United States Constitution, as well as the Supreme Court's decision in *U.S. v. Windsor,* 133 S. Ct. 2675 (2013), leads her to the unavoidable conclusion that the MMA is unconstitutional both on equal protection and due process grounds. According to her understanding of the Fourteenth Amendment, access to marriage is a fundamental right which cannot constitutionally be infringed by the State without compelling justification.

Moreover, the State has not advanced a single justification showing that the MMA meets even rational basis review.

For these reasons, Brown could not and cannot defend the MMA. At trial, she testified on behalf of Petitioners and submitted briefs in support of their position. Following the district court's decision finding the MMA unconstitutional, Brown was one of four Michigan county clerks who opened offices on Saturday and waived the three day waiting period to issue marriage licenses. As soon as she is permitted to do so, Brown will again issue marriage licenses to otherwise qualified same-sex couples.

She files this amicus brief in support of petitioners to describe the negative impact and consequences for county clerks such as herself which would be caused by the "wait and see" and "let the people decide" position propounded by the Sixth Circuit and to explain why that decision must be reversed and district court's judgment reinstated.

II. Lisa Brown's Testimony at Trial

The trial focused on whether there was a rational basis justifying the MMA. The State Defendants offered up the following as legitimate state interests: (1) encouraging an optimal environment for child rearing; (2) proceeding with caution before changing/redefining traditional marriage; and (3) tradition and morality.

The trial focused on testimony from social science experts. Brown did not produce or examine any witnesses, but did testify before the court in order to state her position. She testified that Michigan county

clerks may not consider stability of the relationship of the applicants, parenting skills, likely future outcomes of children, or ability to procreate when asked to issue a marriage license. In fact, Michigan county clerks merely request verification of the current marital status, age, and residency of the applicants. Brown, Trial Tr. 3/3/14 pp 32-40.

The trial court found Brown's testimony "highly credible" and gave it "great weight." The court emphasized that clerks cannot inquire as to whether applicants intend to raise children, whether they possess good parenting skills or whether they have a criminal record. *DeBoer v. Snyder*, 973 F. Supp. 2d 757, 765 (ED Mich 2014).

The trial court ruled that the "MMA impermissibly discriminates against same-sex couples in violation of the Equal Protection Clause because the provision does not advance any conceivable legitimate state interest." *Id.* at 768. Same-sex couples immediately began applying for marriage licenses after Judge Friedman's ruling on the evening of Friday, March 21, 2014. More than 300 marriage licenses were issued to same-sex couples state-wide in the hours after Judge Friedman's ruling and before this Court's temporary stay. At least 130 of those licenses were returned to be processed in Oakland County for filing. *Caspar v. Snyder*, _ F. Supp 3d __ , 2015 US Dist LEXIS 4644 (ED Mich 2015).

There is no legitimate basis for a "wait and see" position for this case. Such a result will only allow for mischief by those who seek to deny same-sex couples their constitutional right to marry.

III. A "Wait and See" Approach Will Perpetuate Discrimination Against Same-Sex Couples Seeking Marriage Protection of Their Intimate Relationship

In describing the impact of DOMA on same-sex couples, the majority in *Windsor* stated that the law placed these couples "in an untenable position of being in a second-tier marriage. The differentiation demeans the couple, whose moral and sexual choices the Constitution protects, (citing *Lawrence v. Texas*, 539 U.S. 558 (2003)) and whose relationship the State has sought to dignify. And it humiliates tens of thousands of children now being raised by same-sex couples. The law in question makes it even more difficult for the children to understand the integrity and closeness of their own family and its concord with other families in their community and in their daily lives." *United States v. Windsor,* 133 S. Ct. 2675, 2694 (2013)

Quoting from *Department of Agriculture v. Moreno,* 413 U.S. 528–535 (1973), the majority in *Windsor* stated that "the Constitution's guarantee of equality 'must at the very least mean that a bare congressional desire to harm a politically unpopular group cannot' justify disparate treatment of that group." *Windsor,* 133 S. Ct. at 2693.

In some of those states where the bans on same-sex marriages have been found unconstitutional, public officials have continued to discriminate against those same-sex couples wishing to exercise their right to marry. The following is a partial list of burdens placed on public officials responsible for carrying out marriage laws or unjustified discrimination levied against same-sex marriage aspirants in late 2014 and in 2015 in

those states where federal courts have struck down statutory and constitutional bans.

Oklahoma: On January 14, 2014, the United States District Court for the Northern District of Oklahoma ruled that the Oklahoma constitution which prohibited same-sex marriages violated the Equal Protection Clause of the Fourteenth Amendment of the U.S Constitution. HB 1599, entitled the "Preservation of Sovereignty and Marriage Act" was introduced and passed the Oklahoma House Judiciary and Civil Procedure Committee on February 18, 2015. The Bill makes it illegal for any state employee to issue a marriage license to a same-sex couple. HB 1599 reads in part that "No employee of this state and no employee of any local government entity shall officially recognize, grant or enforce a same-sex marriage license and continue to receive a salary, pension or other employee benefit at the expense of taxpayers of this state." http://webserver1.lsb.state.ok.us/cf_pdf/2015-16%20INT/hB/HB1599%20INT.PDF The punishment is essentially discharge from employment.

South Carolina: On November 12, 2014, the United States District Court for South Carolina ruled that South Carolina's statutory and constitutional provisions prohibiting marriage between persons of the same-sex violated the U.S, Constitution. *Condon et.al. v. Haley et.al.*, docket no: 14-cv-4010. The Fourth Circuit Court of Appeals refused to stay the case. On November 20, 2014, the Supreme Court denied the Attorney General's application for stay. 574 U.S.___, pending case 14A533.

Under HB 3022 as introduced in the South Carolina House judiciary Committee on January 13, 2015, "No

state or local taxpayer funds or governmental salaries may be paid for an activity that includes the licensing or support of same-sex marriage." The bill further states that "No state or local governmental employee officially shall recognize, grant, or enforce a same-sex marriage license." http://www.scstatehouse.gov/sess121_2015-2016/bills/3022.htm.

North Carolina: North Carolina began allowing gay marriages in 2014 to comply with a federal court order. On February 25, 2015, the North Carolina Senate passed SB 2 which is legislation allowing employees to recuse themselves from performing marriages by citing a "sincerely held religious objection." http://www.ncleg.net/gascripts/BillLookUp/BillLookUp.pl?Session=2015&BillID=s2

Utah: Same-sex marriages became legal in Utah on October 6, 2014, after the U.S. Supreme Court refused to hear an appeal from the Eleventh Circuit Court of Appeals. Within hours of the Supreme Court's action, the Eleventh Circuit lifted its stay on the lower court ruling finding Utah's ban on same-sex marriages unconstitutional.

On December 19, 2014, HB 66 was introduced in the Utah House. The text states that a person authorized to solemnize a marriage "is not required and may not be compelled to solemnize a marriage when doing so would violate the person's sincerely held religious beliefs, tenets, doctrine, practices, or the person's fundamental right to religious liberty." http://le.utah.gov/~2015/bills/static/HB0066.html

Texas: On February 26, 2014, the United States District Court for Western District of Texas struck

down the Texas ban on same-sex marriages because it violated the Equal Protection and Due Process Clauses of the U.S. Constitution. *De Leon et.al. v Perry et.al.*, docket no 5:13-cv-0098. The Court stayed its ruling and that case is pending before the Fifth Circuit Court of Appeals.

On February 19, 2015, the Texas Supreme Court granted a stay of two trial court rulings that Texas' constitutional amendment banning same-sex marriages violates constitutional protections to equal protection and due process of law. Motions to stay orders by two Travis County judges, one in a probate case and the other a temporary-restraining order granting a same-sex couple a marriage license, were sought by the Texas Attorney General's Office. http://www.txcourts.gov/supreme/news/supreme-court-issues-stay-order-to-halt-same-sex-marriage-rulings.aspx

On February 20, 2015, SB 673, known as "The Preservation of Sovereignty and Marriage Act" was introduced in the Texas House. SB 673 centralizes the process of obtaining marriage licenses to a single Texas entity, the Secretary of State. This will ensure uniformity and prevent noncompliant individuals within a county from issuing marriage licenses that do not conform to state law. http://www.capitol.state.tx.us/Search/DocViewer.aspx?ID=84RSB006731B&QueryText=SB%2bOR%2b673&DocType=B

Nebraska: On March 2, 2015, the United States District Court for Nebraska ruled that the Nebraska "Defense of Marriage" Amendment to the Nebraska Constitutional was unconstitutional and announced that it would issue an injunction against enforcement of the amendment on March 9, 2015. *Waters et.al. v.*

Rickets et. al. docket no: 8:14 cv 00356. Otoe County Clerk Janene Bennett said that she will not issue marriage licenses to same-sex couples. The clerk informed the *Journal Star* that she will not issue marriage licenses to same-sex couples because of her Catholic beliefs. "It's God's law. Marriage was instituted for man and woman for procreation." http://journalstar.com/news/local/clerk-refuses-to-issue-marriage-licenses-to-gays/article_871e04cd-47e1-5c30-9b2a-0b4cd9cfb0d4.html

Alabama: On January 23, 2015, the United States District Court for the Southern District of Alabama found unconstitutional the State of Alabama's "Alabama Sanctity of Marriage Amendment" and the "Alabama Marriage Protection Act." *Searcy et.al. v. Strange*, docket no: 1:14-cv-0208. The court placed a 14 day stay on its order. Probate judges in Chilton, Elmore, Geneva and Monroe counties refused to issue same-sex marriage licenses or perform same-sex ceremonies. The Pike county probate judge said he has stopped issuing marriage licenses, including to opposite sex couples. Much of the changes on the county level are due to Alabama Supreme Court Justice Roy Moore sending a memo to probate judges in Alabama counties telling them to uphold the state's laws on marriage until they hear otherwise. http://uwamuse.com/same-sex-marriage-prevails-in-alabama/. The Eleventh Circuit Court of Appeals denied a request to stay the ruling on February 9, 2015 and the U.S. Supreme Court, in a 7-2 vote, refused to stay the ruling of the Alabama District Court. 574 U. S. ____ (2015) No. 14A840.

The issue of whether probate judges are acting as executive branch or judicial officials was addressed in a mandamus petition filed February 12, 2015 in the Alabama Supreme Court by the religious nonprofit Liberty Counsel. The petition asks the state high court to order probate judges who were issuing marriage licenses to same-sex couples to cease doing so. On March 3, 2015, the Alabama Supreme Court ordered probate judges to "discontinue the issuance of marriage licenses to same-sex couples" *Ex parte State of Alabama*, Case No. 114096 (Sup Ct Ala 2015) http://www.abajournal.com/news/article/federal_judge_orders_alabama_judge_to_issue_gay_marriage_licenses_new_suit.

These examples illustrate the depth of the ongoing animus toward this unpopular group even in some of those states where the discriminatory laws have been eliminated. The burdens imposed by these legislative and judicial enactments undermine the authority of the courts and the rule of law. The unequivocal protection of the constitution is needed now.

The attacks on those same-sex couples seeking the protection of the states' marriage laws and upon those public officials charged with the duty to administer the marriage laws fairly and without animus will persist unless this court acts now to declare that the intimate relationships at stake are entitled to unburdened constitutional protection.

CONCLUSION

Ms. Brown knows, as we all do, that committed same-sex couples live together as a family, raise children together, provide financial stability for each

other, assist each other in time of illness, help each other's family members, and at the end of life they are there to provide comfort and say goodbye. There is no evidence on the record supporting any rational reason why they should be banned from doing so as a married couple.

Same-sex couples may not lawfully be denied the right to marry. The trial court correctly determined that the MMA violates equal protection because the rationales advanced by the State Defendants do not meet even rational basis scrutiny. There is no reason for a "wait and see" approach which would permit the perpetuation of the discrimination against this historically unpopular group as demonstrated by recent events in Oklahoma, South Carolina, Texas, Utah, Alabama and Nebraska.

This Court should reverse the Sixth Circuit decision and reinstate the judgment of the trial court.

Respectfully submitted,

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